

## A Family Guide to the Indian Child Welfare Act (ICWA)

By

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The purpose of this booklet is to help American Indian families understand the Indian Child Welfare Act (ICWA), and the timeline for out of home placement of Indian children under the ICWA in Minnesota. This booklet will answer commonly asked questions about the ICWA , and give a general outline of the permanency timelines, the time set out by the ICWA and by the state to have a permanent placement (adoption or long term foster care) when a child is placed out of the home.

### What is ICWA?

The Indian Child Welfare Act (ICWA) is a federal law that was created in 1978 in response to state and local Indian child welfare policies and their negative impact on Indian families. Indian children were placed in foster care far more often than non-Indian children and the impact on their families, tribes and cultural heritage was devastating. ICWA is a means of keeping the sovereign status of Indian tribes over their children and members by keeping Indian families together.

ICWA sets priorities for state courts and social services to follow when dealing with Indian children. From the moment an American Indian child is taken out of a home, ICWA keeps in place strict procedures to make sure that the child is placed in the most appropriate home possible.

If an Indian child is to be placed in foster care or pre-adoption settings, ICWA requires that the proper authorities make every effort to first place the child 1) with their extended family, and if that isn't available, then 2) with a foster home licensed, approved by the child's tribe, and if that isn't

available, then 3) an Indian foster home licensed or approved by a non-Indian authority, and finally 4) an institution for children approved by the tribe.

For adoption, the placement preference is: 1) a member of the Indian child's extended family; 2) other members of the Indian child's tribe; and, 3) other Indian families.

### To whom does ICWA apply?

ICWA applies to any child that is either 1) a member of a tribe, or 2) eligible for membership or enrollment in a tribe. If a child's parent is a member of a tribe, ICWA must be applied until the **tribe** determines that the child is not eligible for membership or enrollment. If anyone believes that a child might be Indian, ICWA must be applied until it is proven that the child is not eligible for tribal membership or enrollment.

Indian families should notify their social workers or child protection workers as soon as possible that they are Indian and from which tribe they are members or enrolled, or for which tribe they might be eligible for membership/enrollment.

### When does ICWA apply?

ICWA will apply the day a child is removed from the home. ICWA will apply to all Indian children until the tribe determines whether they are a member or enrolled and the tribe notifies the court.

ICWA **will not** apply to divorce or custody proceedings or any other proceeding between parents.

ICWA **does not** apply to offenses that, if committed by an adult, would be a crime (for example, auto theft, burglary, etc.). However, some delinquency proceedings that result in a child being removed from a home might be ICWA applicable such as truancy or incorrigibility (under age smoking, curfew violations, etc.).


### Can I get a lawyer?

By law, a lawyer must be provided to anyone who cannot afford one. Many times, this is a Public Defender. If you *can* afford a lawyer, you may retain one at your own expense.

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\* We wish to thank the ICWLAP, Indian Child Welfare Legal Advocacy Project at Ain Dah Yung (Our Home) Center and Minnesota Department of Human Services for lending their permission to use their permanency timelines as a basis of development for this publication.





An attorney cannot represent both parents in a proceeding, especially if the two parents want different things to happen. It is always best for each parent to get their own lawyers. You may ask the judge for a lawyer at any time, but it is best to ask as soon as possible. To qualify for a Public Defender, the court will have to conduct an inquiry in court to determine if you cannot afford a private attorney.

In addition, the court may appoint counsel for the child over the age of 14 years old as well if the court finds that it would be in their best interest. If the child is under 14, a guardian ad litem (or legal guardian) will be appointed to represent the best interests of the child.

There will be many lawyers involved in an ICWA case. First, a lawyer for the county/social services will be in attendance. Likely, there will be a lawyer for your child, then; there may be an attorney for the guardian ad litem, a lawyer for the parent(s), finally, perhaps a tribal attorney.

Regardless of whether you obtain a lawyer or not, you may supply your wishes or a report to the court in a written letter for the record. There are no formal requirements for writing your wishes down, but they should be legible and clearly stated. No one in at the proceeding/hearing may ask you if you have something to submit, so if you do, make sure to notify the judge or the judge's clerk preferably before the hearing or even during the hearing.

### **Who are the people involved and what do they do?**

An in-take child protection worker is part of the social services department and they work to protect the child in an emergency and may be involved temporarily until the child is assigned a permanent social worker. This permanent social worker may be assigned to the child after the initial hearing/Emergency Protective Care Hold.

The social worker helps the child and family access services such as support groups, housing, chemical dependency treatment, medical care, etc. In addition, the social worker will help develop a plan for the family to follow in order to get the child back.

As noted above, a guardian ad litem (a legal guardian) acts as a representative for very young children and addresses the "best interests" of the child.

The difference between a guardian ad litem and an attorney is that a guardian ad litem may advocate for something that the child does not want but the guardian has determined is best for the child. An attorney may never do this. A lawyer who represents the child must do as the child wishes.

A "qualified expert witness" is required if an Indian child is to be put into foster care or if parental rights are going to be terminated. A qualified expert witness is someone who will testify and understands the tribe's culture and heritage and whether it is safe for the child to go home or remain away from the parents to avoid danger or abuse. The expert can be a person from that child's tribe with experience with the tribe's childrearing practices, someone with much experience with providing services to Indian children and families, or a professional with education and experience in their field/profession.

### **What is an involuntary placement?**


In cases where there is immediate danger to a child's health, safety, or welfare, a child may be removed from the home right away. This is an involuntary or "Emergency Protective Care" placement (also called a "hold"). During this time, it is suggested but not required, that the placement comply with ICWA. However, after 72 hours (3 business days), a hearing must be held to determine whether the child can return home or whether more services for the child or family are needed. If the danger is still present in the home the child cannot return and a permanent or long-term foster care placement proceeding will begin by the county filing paperwork with court for a CHIPS. This action is also known as a Child in Need of Protection or Services (CHIPS) petition.

### **What is a voluntary placement?**

In some cases, the parent asks for the Indian child to be removed from the home. Usually there is an illness, housing problems, legal troubles or other problems that prevent the parent from being able to take care of the child. These voluntary placements can also be used when the child has an emotional or medical disability that prevents the parent from being able to provide the proper care for that child.

When requesting voluntary foster care, a parent must have the items and consequences of the placement explained to them, the parent must state their wishes for the placement in writing in front of a judge. Also, they must





get a certificate from the judge that confirms the parent fully understands the agreement and the consequences. Afterwards, a parent can request to have their child returned at any time before an adoption is finalized and the child must be returned home within 24 hours. At the same time, if the county believes it is not in the child's best interest to return home, a CHIPS petition may be filed and the Indian child could be kept in out of home care.

### **Where will my child be living while in placement?**

In an emergency, the child will probably go to a shelter or to a relative or to short term foster care. In any case, a culturally sensitive environment should be provided.

For long-term foster care the ICWA placement preferences will apply. (See page 1)

### **How do I get the services that my child/I/my family need to get my child back?**

ICWA requires that a court and social workers use "active efforts" to return your child to your family. This means that a social worker (and if available, a culturally appropriate worker) will use thorough/detailed, careful and vigorous/strong efforts to prevent an Indian child from being placed outside the home unless absolutely necessary or a quick return to the home if placement has already happened. The social worker can put Indian parents in touch with culturally sensitive programming, making visitation arrangements, and helping you contact chemical dependence treatment facilities, housing assistance, family counseling, parenting classes, violence prevention programs, etc.

"Active efforts" also applies to prevent an out of home placement of the child. It means that every effort a social worker can make to prevent the break-up of American Indian families must be made including using services and resources such as the child's tribe, extended family, etc. to help the family function successfully as a home for the child.

### **What is "notification" and how does it apply to me?**

In any ICWA proceeding, the court must notify the Indian child's tribe, the parent or the guardian of the child. The court must send the parent/guardian and the tribe a registered letter, with return receipt requested telling them

what proceedings are taking place and when and that they have the right to intervene/get involved.

The tribe will first determine whether the child is enrolled or eligible for membership. The tribe may look for relatives where the child might live while in placement or offer services to the family. Finally, the tribe may send a representative to the hearings or request that all further proceedings are transferred to tribal court.

### **PERMANENCY TIMELINE**

Under this timeline, a child must be put in permanent placement (a permanent home) soon after removal. ***For a child under 8 years old, the limit is 6 months for the county to have a permanent placement for the child after the child has been in involuntary placement. For children over eight years old, the county has 12 months.***

The county will work towards having the Indian child returned to the parent and at the same time will work to find an alternative placement for the child if reunification plans with the family do not work.


The preferences for permanent placement include: 1) reunification with the parents; 2) transfer of legal custody to a native/extended family member; 3) termination of parent rights; or 4) long-term foster care (for a child over the age of 12).

There are two types of placement that result in different start times of the permanency timeline. For involuntary removal, the permanency timeline begins the day the out of home placement starts.

For voluntary removal, the clock starts running 60 days after the child was voluntarily placed. If the child has a severe disability, sometimes timeline exceptions will be made.

In addition, all out of home placement times will be *added together (accumulate)* for when a child has been placed out of the home of the parent within the past five years. For example, if a 4 year old was taken out of the home in 2007 for one month, then again in 2008 for two months, the accumulated time will be three months. Therefore, if the child is taken out of the home again before the child turns eight years old, the parents will





only have three out of the six months left to solve their problems before the child is permanently placed out for adoption.

### **Day 1 - 3: The child is removed from the home**

On the first day, the child will be removed from the home by a county worker with a court order or by a police officer because of the officer's belief of need of emergency protective care. This will often happen if the child is a runaway or if the conditions in the home are a danger to the child's health, safety or welfare. Within 72 hours, a CHIPS petition will be filed by the county.

The county must try to contact the child's tribe to keep them informed that the child has been removed. A child believed to be Indian will be treated as if ICWA applies until otherwise determined by the tribe. The tribe may intervene at any time.

At this point, the child may be appointed a guardian ad litem or an attorney or both. The parent should also look into getting a lawyer at this time either through the court or on their own.

**In the first three days, if changes can be made that will keep the child safe, these should be done immediately. For example, a parent should begin a chemical dependency program or an abuser should be removed from the home, a babysitter obtained or whatever needs to be done to provide a safe home for the child. The parent should also contact relatives to care for the child in the event that the child cannot be returned home.**

### **Day 3: Emergency Protective Hearing (also called the "Hold" hearing)**

At this hearing, the court may return the child to the parent if the court believes there is a plan in place to keep the child safe. The parent should work with the county social service worker, family members and the child's tribe in developing a plan to keep the child safe. Any changes a parent needs to make to provide a safe home for the child will be discussed at this hearing. The parents need to make these change as fast as possible to avoid the child from going into permanent placement elsewhere.

The county files the CHIPS petition giving the reason they believe their involvement is necessary. The parent's attorney (if there is one) will tell the

court the parent's side of the situation and the court will allow you to submit your own testimony as well. Witnesses can also be called at this time. The court will decide whether the allegations justify continuing court involvement.

The court will also decide if the child should remain in temporary placement. If the child is ordered into placement, the court may order the county to look for relatives to take the child temporarily and social services will also look into providing for the child permanently. If a relative has been chosen and is willing to take the child, this relative should attend the hearing. If there is no relative that can take the child a home will be sought that is licensed/approved/specified by the tribe.

Tribal social services are contacted and a tribal representative may be present at the hearing. The tribe will be asked if the child is a member, enrolled or eligible. They may also be asked to help find relatives.

If the parent wants a family group conference, it may be arranged. In a family group conference, the family and the professionals come together to help the parent develop a plan for the child's safe return, if possible. This process may also help develop options for a more permanent placement (adoption), if needed.


A parent, the tribe, or the custodian may ask the court to transfer the case to tribal court. The case may be transferred to tribal court unless: 1) either parent objects; 2) the tribal court declines to accept the case; or 3) the state court finds a valid, legal reason not to transfer the case. A transfer should be asked for as early as possible.

### **Day 13: Admit/Deny Hearing**

If a party fails to show up in court after receiving notice, the court may decide that the allegations in the petition are true and start permanent placement proceedings.

The parent will be asked to admit or deny the allegations in the CHIPS petition. If the parent admits that some of the allegations are true, the court will order the parent to complete a case plan in order to get their child back. If the parent denies the allegations, a pretrial conference will be scheduled.





The tribe will have received a formal written notice by registered mail, with return receipt requested, of the case prior to this hearing. The court and tribe will be informed of the parent's progress completing the plan to create a safe home for the child. The court may return the child if they find there is a plan in place to keep the child safe. The court will keep track of the child's progress while the child is in placement.

### **Day 30: Case plan filed with the court**

The case plan is a written description of the changes the parent needs to make to provide a safe home for the child. These changes should have been discussed at the Emergency Protective Care hearing or shortly after in a meeting with the tribe, county and parent attending. The county will make active efforts to bring the child and parent back together. These efforts are set out in the case plan and typically include treatment programs, education programs, transportation for visits and housing assistance, to name but a few.

### **Within 15 days of trial: Pretrial Conference**

If the admission is made by a parent or if the county proves to the judge that at least some of the allegations in the CHIPS petition are true, the court will determine if the court or county involvement is still needed. This is called a "finding" that the child is in need of protection or services.

If no admission is made and the county cannot prove anything, the judge may dismiss the case.

If a parent does not show up at a hearing, the court may decide that the allegations in the petition are true and start permanent placement proceedings.

### **Days 63 - 93: Trial to establish the need for temporary placement**

A parent may still admit that the allegations in the CHIPS petition are true and the court may order a case plan. If the parent still denies the allegations, the trial will continue. The parent or custodian or tribal representative may still ask for transfer to tribal court. (See page 6).

To keep the child in placement the county must present to the court a tribally approved qualified expert witness that understands the tribal

customs and childrearing practices of the tribe. The witness may testify that the child is likely to suffer serious emotional or physical injury if returned home.

The county must show they have made "active efforts" to prevent the need for placement until permanency.

Monthly visits to the child by the social worker and the guardian ad litem are required.

### **Every 90 days after disposition: Review Hearings**

In the review hearings, the court is kept up to date on the parent's progress at completing the case plan and the child's progress in care. Parents may still provide their own reports to the court explaining their compliance with the case plan or provide pertinent information about the case. The child may be returned home if the parent has made enough progress to be able to provide a safe home.

Attempts at searching for relatives may continue until a permanent placement (this includes a pre-adoptive placement) for the child has been found.


The county must show they have made "active efforts" to prevent the need for placement until permanency.

Monthly visits to the child by the social worker and the guardian ad litem are required.

The parent or custodian or tribal representative may still ask for transfer to tribal court. (See page 6).

### **Day 180: Hearing to determine the Permanent Placement of a child under 8 years old**

At the permanency hearing the court may decide one of four things. 1) The child can return home because the case plan has been completed by the parent. 2) The parent has maintained contact with the child and is making good progress but still needs more time. 3) The child should be legally and physically transferred to a relative, foster care or a pre-adoptive home. 4) Grounds for termination of parental rights exist.



A transfer to tribal court may still be done at this time.

The county must show they have made “active efforts” to prevent the need for placement until permanency.

Monthly visits to the child by the social worker and the guardian ad litem are required.

**1 year: Hearing to determine Permanent Placement of a child over 8 years old**

At the permanency hearing the court may decide one of five things. 1) The child can return home because the case plan has been completed by the parent. 2) The parent has maintained contact with the child and is making good progress but still needs more time. 3) The child should be legally and physically transferred to a relative, foster care or pre-adoptive home. 4) Grounds for termination of parental rights exist. 5) The child may remain in long-term foster care (especially for children over 14).

A transfer to tribal court may still be done at this time.

The county must show they have made “active efforts” to prevent the need for placement until permanency.

Monthly visits to the child by the social worker and the guardian ad litem are required.

**Post-adoption**

After an adoption is finalized, the parent may withdraw their consent to adopt for up to two years if a voluntary placement/voluntary adoption was done and they believe they were coerced into giving their consent to adopt.

After an adoption is finalized, a parent or tribe may file a “Motion to Invalidate Proceedings” if ICWA law violations made the voluntary or involuntary adoption possible.